

April 16, 1993

P.S. Protest No. 93-03

HRATCH KOUYOUMDJIAN & ASSOCIATES, INC.

Solicitation No. 059984-93-A-0003

DIGEST

Protest against elimination from consideration for A-E selection is sustained where selection board based elimination on protester's failure to supply resumes for all mechanical engineers determined to be necessary for project; firm's submissions otherwise indicated that the necessary number of mechanical engineers was available.

DECISION

Hratch Kouyoumdjian & Associates, Inc., (HKA) timely protests its disqualification during the prescreening of proposals received in response to Solicitation No. 059984-93-A-0003 for architect-engineer (A-E) services. HKA alleges that the use of undisclosed evaluation criteria prevented it from being selected to interview with the Postal Service.

The Postal Service's San Bruno, CA, Facilities Service Office (FSO) published a notice in the Commerce Business Daily (CBD) on December 10, 1992, to solicit proposals from A-E firms for a project to renovate a nine-story building in San Bruno. Qualified firms were asked to submit completed Standard Forms (SFs) 254, the A-E and Related Services Questionnaire, and 255, the A-E and Related Services Questionnaire for Specific Project.¹

¹ The submission of SFs 254 and 255 is governed by Procurement Manual (PM) 11.3.2 a. When they are received, the "responsible official" sets up at least one A-E evaluation board with at least three members to review them. PM 11.3.2 b. PM 11.3.2 c.2(c) sets forth criteria for the board to use in evaluating the submissions, including "[the general stability of the firm, and capability of the firm to sustain loss of key personnel without adverse effect on current work"; and "[the professional background of key personnel, other than principals, who will be assigned to the project." PM 11.3.2 c.2(b) and (f).

Handbook RE-14, Design and Construction (RE-14), also contains procedures for A-E selection.

The CBD announcement described the project as follows:

This project is for the Architectural and Engineering services for a major renovation of [a] nine (9) story building for the Pacific Area Office. The project consists of design, preparation of drawings, specifications and construction documents for building seismic upgrade, HVAC improvements, sprinkler system additions and office renovations at the Pacific Area Office.

The announcement stated that selection would be based on information in the SFs 254 and 255, and provided:

Consideration will be given to firms responding to this advertisement in accordance with the instructions in the following order of preference: 1. Local - within 100 miles of San Bruno, CA. 2. Within the State of California. 3. Within the Western States. 4. Within the Continental United States. . . . Other evaluation factors for award will be based on: Qualifications, Project Management, Resources, Design Experience, Contract Administration, MBE participation, Estimating Cost Control, Plans and Specifications, Construction Administration, Office, and Total Quality Management.

Fifty-nine proposals were received by the initial response date of January 4, 1993. Subsequently, the three-member evaluation board met, selected prescreening criteria and issued a prescreening memorandum pursuant to procedures set out in Handbook RE-14, Design and Construction (RE-14).² That memorandum established the following minimum staffing for the project:

Two Licensed Professional Mechanical Engineers
Two Licensed Professional Architects
Two Licensed Professional Structural Engineers
One Licensed Professional Electrical Engineer

(..continued)

Procedure 110.20, "A-E Evaluation Procedures," states, under the heading, "Criteria for Evaluation:" "Special criteria necessary for evaluating qualifications, which are specifically and uniquely required for the project, must be published in the CBD notice. Examples are experience in historic building renovation, renovation, repair and alteration, and seismic design."

² Procedure 110.20 states that the evaluation board should conduct a prescreening meeting after the CBD notice period has closed and keep the minutes of the meeting. Those minutes are to include:

The criteria established for prescreening evaluation, including minimum or maximum size of the prime firm, the project-specific disciplines required, and the minimum number of professional staff (listed by discipline) necessary to accomplish the project work in a satisfactory and timely manner.

RE-14, Prescreening Process, 2.a (4); see also 4.b (2). The RE14 requires that "[p]rescreening criteria for the project must be established by the board before evaluation of any firm and must include as a minimum the criteria set by PM 11.3.2, plus any criteria distinctive to the particular project." RE-14, Prescreening Process, 4.a.

One CADD Designer

Using the information contained in the SFs 254 and 255 the evaluation board designated nine firms to be called for interviews (the "short list"). HKA was not included on the short list. The evaluator's prescreening evaluation forms indicate that they concluded that HKA did not meet the prescreening criteria, with all three noting that HKA had identified only one licensed mechanical engineer.

Block 4 of SF 255 requires an A-E firm to list the number of its personnel by discipline. HKA listed six mechanical engineers, three architects and three computer assisted design and drafting (CADD) personnel in Block 4, in addition to other relevant personnel. Block 7 of SF 255 calls for submission of "[b]rief resume[s] of key persons, specialists and individual consultants anticipated for this project." Among the resumes submitted by HKA were those of one California-licensed mechanical engineer and one licensed architect. HKA submitted no resume for a CADD operator. Block 10 of SF 255 is to be used "to provide any additional information or description of resources (including any computer design capabilities) supporting your firms's [sic] qualifications for the proposed project." In Block 10 HKA listed seventeen people who would be available for this project as of February 1, 1993, including two mechanical engineers (only one of which was indicated, by the initials "P.E." after his name, to be a licensed professional engineer),³ three structural engineers and two architects. In addition, HKA described its CADD capabilities. Also in Block 10, HKA stated that the licensed mechanical engineer would commit 25% of his time to this project, whereas the other mechanical engineer proposed to commit 75% of his time to it.

The protester apparently found out that it had not been selected for interview in a telephone conversation on February 1.⁴ On February 4, HKA wrote to the manager of the San Bruno FSO, alleging that it had been eliminated on the basis of an unpublished criterion (an insufficient number of resumes for key personnel) and asking that all criteria be disclosed and that HKA be given the opportunity to meet those criteria. On February 9, the San Bruno FSO manager replied, stating that his review disclosed "no irregularities" in the subject evaluations. This office received HKA's protest on February 16.

The protest alleges that the Postal Service added evaluation criteria after the proposal submission date that were not stated in the CBD or otherwise disclosed. According to the protester, the new criteria required each firm to submit the resume of two California-licensed mechanical engineers and architects, and the resume of one CADD operator. The protester states that its "design team" consists of at least the minimum numbers of personnel required by the Postal Service for each discipline and that Block 4 of SF 255 demonstrated that. HKA states that it submitted resumes as directed by Block 7 for one of its mechanical engineers and one of its licensed architects (and none for its CADD operators), "unaware that the USPS would later set criteria calling for only 2 resumes from

³ As discussed further at footnote 10, below, the second identified mechanical engineer is, in fact, licensed.

⁴ Letters informing those offerors which did not make it past the prescreening process that they would not be invited for interviews were not mailed until March 11.

structural engineers, 2 from mechanical engineers and architects and none from interior designers or costs estimators, etc."

HKA states that it relied on the instruction at Block 7, which asks firms to submit only a "[b]rief resume of key persons, specialists and individual consultants anticipated for this project." The protester contends that "[i]f the number of resumes for the members of the design team . . . was a decisive factor for evaluating qualifications . . . that special criteria should have been published in the CBD." The protester asks that the "arbitrary, nonsensical exclusion of HKA" be rectified.

The contracting officer denies that new criteria were adopted after the submission of proposals. Responding to the protest, he states that the evaluation factors published in the CBD, including "resources," encompass the criteria for A-E firm evaluation delineated in the PM, including PM 11.3.2 c.2, which indicates that consideration of a firm's "resources" would include analyzing the "capability of the firm to sustain loss of key personnel without adverse effect on current work" and the volume of work "that can be handled at one time."

Further, the contracting officer asserts that the RE-14 procedures provided for the prescreening meeting in order "to select highly qualified firms for interview." He points out that the RE-14 requires that minutes of the meeting be kept to demonstrate the criteria for evaluation, including minimum staffing requirements. See footnote 2, *supra*.

The contracting officer defends the requirement for two mechanical engineers, stating that one would back up the other if one is absent, and that two engineers would provide diverse expertise and alternative solutions to problems. The contracting officer emphasizes that the criteria which were used were not unpublished since they are set out in the PM, and that the specific personnel levels implement the evaluation factors listed in the CBD and are consistent with the factors published in the advertisement.

Responding to the protester's specific allegations, the contracting officer states that Block 7 of Form 255, unlike Block 4, is "project-specific." That is, he understands Block 7 to require that the offeror identify those specialists from each discipline that actually would be working on this project. While the contracting officer acknowledges that HKA showed six mechanical engineers at Block 4, Block 4 relates to the professionals in each discipline employed by the firm. Since the project requires two mechanical engineers, and HKA supplied the resume of only one, the contracting officer asserts that HKA did not meet the "resources" requirement of the CBD notice. The contracting officer concludes, "[f]ar from being 'arbitrary' and 'nonsensical,' the procedures that were followed were consistent, logical, and specifically required by the Procurement Manual and the Design and Construction Handbook (RE-14)."

Replying to the contracting officer's statement, the protester reiterates that its "design team" includes two mechanical engineers, even though it submitted the resume of only one. The protester points out that the prescreening memorandum does not state that the number of resumes submitted would be a prequalifying factor; rather, it lists the minimum numbers of professionals required for the design team. The protester asserts that the prescreening evaluators erroneously assumed that Block 7's request for resumes of "key" persons meant the resumes of everyone on the design team. HKA points out that the contracting officer's statement describes the second mechanical engineer as "backup," and inquires how it

should have known that "backup" personnel are also "key" personnel. Finally, the protester points to examples of other Postal Service notices published in the CBD which, unlike the notice in this case, specified the numbers of professionals required. The protester concludes by asking that its protest be sustained and that it be allowed to advance to the interviews.⁵

In rebuttal, the contracting officer points to Block 10 of the SF 255, in which HKA identified two mechanical engineers but indicated that only one was professionally licensed. Also in Block 10, HKA committed only 25% of the licensed engineer's time to this project while committing the majority of the other engineer's time to it. The contracting officer contends that HKA unwisely intended to commit 75% of a non-licensed person's time "to accomplish mechanical engineering on a project which requires major renovation of an HVAC system and fire sprinkler system." The contracting officer reiterates that the requirement for two mechanical engineers was reasonable, that Block 7 required the resumes of two licensed mechanical engineers, and that HKA did not meet the prescreening criteria.

An architect firm which was short-listed submitted comments as an interested party, stating that its submissions were based only on published criteria, that it is "perplexed" by HKA's protest and that "[w]e feel strongly that we competed fairly in an open competition for this work. . . ." Another short-listed firm comments that if it was required to submit a certain number of resumes, "we did not know about it," nor did it know of any unpublished criteria.

DISCUSSION

Our review of the selection of an A-E contractor tracks that adopted by the Comp-troller General:

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. *Leyendecker & Cavazos*, B-194762, Sept. 24, 1979, 79-2 CPD 217. In this regard, the protester bears the burden of affirmatively proving its case. *Albert C. Martin and Associates*, *Daniel, Mann, Johnson and Mendenhall*, B-221746, Apr. 7, 1986, 86-1 CPD 343.

Engineering Sciences, Inc., Comp. Gen. Dec. B-226871, July 29, 1987, 87-2 CPD 109, quoted in *Eric Hefty & Associates*, P.S. Protest No. 87-102, February 10, 1988.

The issue in this case is whether the Postal Service properly disqualified HKA from the

⁵ HKA also complains that one evaluator's form shows that it was screened out on January 7, before the prescreening criteria were set. The contracting officer responds that an informal prescreening meeting took place on January 7 for an "initial review" of the SF 255s. He states that the evaluator in question updated the form after the January 20 meeting but neglected to change the date on his prescreening form. The contracting officer's explanation is as inadequate as the "informal" meeting was inappropriate because the prescreening criteria are to be established before evaluation of any firm. See footnote 2, *supra*.

short list because it submitted only one licensed mechanical engineer's resume with its SF 255. For the following reasons, we conclude that it did not.

Procurement officials have broad discretion to determine pertinent evaluation factors, but those factors listed in the solicitation or CBD announcement must "fairly advise prospective offerors of the basis on which their offers will be considered for award." *Dawson Construction Co., Inc.*, P.S. Protest No. 91-47, September 25, 1991; *International Technology Corporation*, P.S. Protest No. 89-21, May 8, 1989. An offeror must have notice of the factors that by themselves could eliminate the offeror from competition. See, e.g., *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992.

The contracting officer is correct that the CBD notice, which listed "resources" as an evaluation factor, need not have listed the number of professionals in each discipline required for the job. A CBD announcement need not list every subfactor used for selection, as long as those subfactors are reasonably related to the published criteria. See *Cohlmia Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988; *Technical Services Corp.*, 63 Comp. Gen. 245 (1985), 85-1 CPD 152.

As discussed in footnote 1, *supra*, the PM sets forth general criteria, including the capability of the A-E firm to withstand the loss of key personnel without a negative impact on the project. Protesters are held to constructive notice of the PM's provisions. See 39 C.F.R. 601.100; cf. *Eric Hefty & Associates, supra*.⁶ It was not improper for the contracting officer to consider those general criteria in the evaluation of the A-E firms.

The requirement that the design team contain two licensed mechanical engineers and the numbers of the other skills determined to be necessary was not, of course, set out in the PM criteria or in the CBD notice (and had not been developed at the time the CBD notice was issued as Procedure 110.20 allows). RE-14 requires that only criteria which are specific and unique to the project need be published. Requirements for specific numbers of commonly-available skills do not appear to be unique within this procedure.⁷ The requirement was not inconsistent with the CBD announcement and with the published PM criteria and we cannot say that it is unreasonable. *Eric Hefty, supra*.

We turn to the question whether the evaluators properly applied the staffing criteria to the protester's submission. If HKA had stated in Block 4 of the SF 255 that it employed only one mechanical engineer, the evaluators would have been justified in not short-listing the protester on that basis. *Id.* However, HKA indicated both in Blocks 4 and 10 of the SF 255

⁶ In *Eric Hefty*, a firm which included only one registered architect objected to the evaluation committee's determination that eligible firms must have at least two registered architects in order to meet the general evaluation criteria of withstanding the loss of key personnel without impact on current work. The decision concluded that the protester had not established that such a determination was arbitrary.

⁷ The protester has noted that the Postal Service has included in some of its CBD notices the numbers of personnel required by discipline. We accept this information as evidence that such listing is feasible, but do not conclude from it that such listing is required.

that it had several mechanical engineers and intended to devote two of them to this project; it was disqualified only because it failed to submit the resumes of two with its SF 255.⁸

The protester apparently defines "key" persons for the purposes of Block 7 as a smaller group than the term "design team," while the evaluation board treated those terms as synonymous. The printed instructions on Form 255 favor the protester's interpretation. The Form 255 states:

"Key Persons, Specialists, and Individual Consultants," as used in this questionnaire, refer to individuals who will have **major** project responsibility or will provide **unusual or unique** capabilities for the project under consideration.

(Boldface in original.)⁹

Moreover, the instructions on SF 255 pertaining to Block 7 include the statement: "Care should be taken to limit resumes to only those personnel and specialists who will have major project responsibilities." It was not unreasonable for HKA to assume that the second mechanical engineer would not be "unique" or otherwise "key" to the design team, when the contracting officer describes the role of the second mechanical engineer as to provide redundancy in the event of the absence of the first.

Finally, the arbitrariness of HKA's prescreening evaluation is underscored by the lack of consideration given to the information submitted in Block 10 of the SF 255. That information supports HKA's position that it proposed two mechanical engineers for the design team.¹⁰ Until the contracting officer mentioned it in his rebuttal, there was no

⁸ HKA also did not submit the resumes of two licensed architects or of one CADD designer, but these failures were not noted consistently on the evaluation forms or cited by the contracting officer as justification for HKA's exclusion from the short list. The evaluators should have applied all of the requirements consistently. See generally, *C.D.E. Air Conditioning Company, Inc. and Coastal Mechanical Corporation*, P.S. Protest Nos. 92-11 and 92-18, April 2, 1992; *Cohlmia Airline, Inc.*, P.S. Protest No. 87-41, October 30, 1987.

⁹ This is not a case like *Artel, Inc.*, Comp. Gen. Dec. B-248478, August 21, 1992, 92-2 CPD 120, in which the CBD notice had specifically stated that the A-E firms would be evaluated in accordance with the ten standard criteria published in the procuring agency's regulation--one of which was the "ability to assign an adequate number of qualified key personnel from the organization." That notice thus identified the need for firms to demonstrate a quantity of key personnel and the protester was properly downrated when it declined to do so and attempted to reserve the designation of key personnel for a later time.

¹⁰ The protester notes that as soon as the issue of the number of resumes for mechanical engineers arose, it submitted, by facsimile, the resume of the second mechanical engineer listed in Block 10. The contracting officer admits that the resume showed that the second mechanical engineer is licensed in California. The contracting officer states that the evaluators could not consider any submissions received after the initial offer due date without appearing to be unfair to other offerors.

The contracting officer could have accepted the faxed resume as a clarification to answer the question of whether the second mechanical engineer listed in Block 10 was licensed, because the omission of the letters "P.E." after his name there appears to have been merely a clerical mistake. The consideration of

indication that Block 10 played any role in the evaluators' decision, or that the estimates of time to be allocated by HKA's mechanical engineers to this project had any bearing on the decision not to short-list the protester.

The protester has met its burden of showing that its prescreening evaluation was arbitrary, unreasonable and inconsistent with the published evaluation criteria.

To remedy this flawed process while ensuring that all offerors compete initially at the same level, the contracting officer is directed to convene a new evaluation board to reconsider for inclusion on the short list all of the firms, including the protester, which were previously disqualified from the short list solely on the basis that the resumes submitted in response to Block 7 of SF 255 failed to demonstrate the availability of the required number of professional staff by discipline. The reevaluation shall include the consideration of any revised or supplemental information received from any participating firm.

The protest is sustained.

For the General Counsel:

William J. Jones
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Contract Protests and Policies

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additional material submitted to revise an A-E submission is comparable to the consideration of a modification to a proposal in negotiation, which PM 4.1.3 d. allows "in the interest of the Postal Service . . . when doing so would cause no delay in the evaluation process." See also PM 4.1.5 a.2, which defines "clarification" as "[c]ommunication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in proposal"; and PM 4.1.5 a.3, which states that communications for the purpose of clarification are not "discussions."

In protests under A-E selection procedures similar to those of the PM and RE-14, the Comptroller General routinely has allowed the acceptance of late SFs 254 and 255 in A-E services procurements and has upheld government agencies' consideration of information from sources other than the SFs 254 and 255 in the course of A-E selection. See, e.g., *Mounts Engineering*, 65 Comp. Gen. 476 (1986), 86-1 CPD 358 (the agency was ordered to reevaluate the top-ranked A-E firms after it had failed to hold any discussions with them; in the reevaluation, the agency was allowed to accept updated SF 255s from all three firms, including one whose initial SF 255 clearly was out of date. The protester's complaint that that firm received an unfair competitive advantage was not upheld). See also, *Perry, Dean, Rogers & Partners: Architects*, Comp. Gen. Dec. B-212691, September 23, 1983, 83-2 CPD 370 (offeror allowed to submit SFs late). See also, *Harding Lawson Associates, Inc.*, Comp. Gen. Dec. B-230219, May 20, 1988, 88-1 CPD 483 ("It is not improper for an agency to reevaluate a firm's eligibility for selection when it receives new information relevant to the selection process."). See also, *Vertran Design Associates*, Comp. Gen. Dec. B-242080, March 8, 1991, 91-1 CPD 265 and *Paul F. Pugh and Associated Professional Engineers*, Comp. Gen. Dec. B-19885, September 3, 1980, 80-2 CPD 171 (audits revealing information not on the SFs 255 could be used to disqualify A-E firms).